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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 721

LEW WAH FOOK, AS GUARDIAN AD LITEM FOR LEW SUEY YET, ALSO KNOWN AS LEW THEW YUT, PETITIONER

v.

HERBERT BROWNELL, JR., AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. Exhibit "A" following p. 15) is reported at 218 F. 2d 924.

JURISDICTION

The judgment of the Court of Appeals was entered January 14, 1955. The petition for a writ of certiorari was filed April 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

while on 90-day leave from his army post in Shanghai (R. 37–39). The two older sons, who had been admitted to the United States as petitioner's sons, also identified the infant here involved as a brother who lived in the same house with them in China (R. 40–43, 52, 56), the second son testifying that the third child always slept with the mother (R. 59–60).

On cross-examination, petitioner was shown an application which he had signed in 1943, in which he listed his children as two sons and one daughter, the daughter named as Lew Siu Ngoot, age 9, date of birth CR 24–8–12 [September 9, 1935] the date of the alleged birth of the infant claimant (R. 70–71, 25). Petitioner's explanation was that he had assumed he had a daughter because his wife, in writing to him of the birth of the third child, had given only the name, which was a girl's name; that it was not until his visit to the village in 1946 that he discovered that the child was a boy who had been given a girl's name because petitioner's mother, who was superstitious, had interpreted omens to mean that if a boy was born, it would not live long (R. 73–76). Although he had corresponded with his wife from 1935 to 1943, no mention was ever made of the sex of the third child (R. 79). Petitioner admitted that in 1943, when he entered the army, he claimed as dependents two sons and one daughter and had never changed the claim (R. 79). He

was discharged from the army in April, 1947 (R. 37).

At the conclusion of the trial, the judge stated as follows (R. 86):

> I think the only thing I can do in this case is render judgment in favor of the defendant. The evidence just doesn't add up. It seems to me, knowing Chinese people and the store they put on boys, and the fact that girls are rather an insignificant quantity, the birth of a boy is a matter of celebration, that it is inconceivable a mother or a grandmother would keep the information from the father for a period of 11 years. If it was a couple of years, I could understand it, but after 11 years, it just doesn't add up.

The formal findings (R. 12–15) include one to the effect that the credibility of the alleged father had been so impeached that the court did not believe his testimony or that of the other witnesses (R. 14). Accordingly, judgment was entered dismissing the complaint (R. 16–17). On appeal, the court of appeals affirmed, stating that "this is the plainest of cases in which we are asked to retry the facts" (R. 93).

ARGUMENT

Petitioner's attack on the sufficiency of the evidence to support the findings of both courts below (R. 12–15) presents no issue warranting review by this Court. The district court, which

heard the witnesses, was justified in refusing to credit petitioner's explanation of his lack of knowledge of the sex of his third child. The findings of fact which required resolution of issues of credibility are not clearly erroneous and therefore should not be set aside. Rule 52 (a), F. R. Civ. P.; *United States* v. *Real Estate Boards,* 339 U. S. 485, 495; *McAllister* v. *United States,* 348 U. S. 19.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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